NO. 16119

United States
COURT OF APPEALS
for the Ninth Circuit

D. W. CLARK and UNION OIL COMPANY OF CALIFORNIA, a corporation,

Appellants,

vs.

MURRAY D. AGATE, TRUSTEE IN BANKRUPTCY of the Estates of ALTON C. SIMMONS, CECELIA MAE SIMMONS, ALVIN L. SIMMONS, ODA JANE SIMMONS and LAWRENCE W. SIMMONS, individually and as co-partners, DBA ALPINE LODGE,

Appellees.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

HONORABLE WILLIAM G. EAST, Judge.

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INTRODUCTORY

Appellee's statement of the case is principally an argument that the two petitions actually filed for adjudication of the transferor-bankrupt should not be considered in determining the "four months'" period. In

> this Act.' This provision clarifies the language of the former statute, and, in addition, makes its terms applicable to corporate reorganizations, arrangements, and wage earners' plans, as well as ordinary bankruptcy. It is fundamental that the 'four months' ' period is an essential element of a preference, and a transfer perfected prior thereto may not be attacked as preferential, except under principles of applicable state law."

With specific reference to the 1950 change, the following quotation from Collier Bankruptcy Manual (second edition) Appendix, §60, page 86, is applicable:

> "In the portion of paragraph (1) retained by the Amendment one change in language was made. The words 'in bankruptcy or of the original petition under Chapter X, XI, XII, or XIII of' were eliminated, and the words 'initiating a proceeding under' substituted so that the focal reference with regard to point of time is 'the filing by or against him of a petition initiating a proceeding under this Act.' This change is largely verbal, substituting a more inclusive and concise phrase for the former language. A 'proceeding under this Act' includes, of course, any type of proceeding dealt with by the Bankruptcy Act, and, in this respect, therefore, the change also served to make clearer the possible application of Section 60a in a proceeding such as that initiated under Section 75."

To the same effect is III Collier on Bankruptcy (14th edition), §60.06 at page 775 (paragraph (2)).

It is thus seen that while the 1938 change was one of substance, the 1950 change was a recodification of verbiage or form only. Neither change has the slightest bearing on the facts of this case, because an ordinary bankruptcy petition is here involved.

In order to apply the statute to this case, it is necessary to omit reference to petitions under Chapters X, XI, XII, and XIII. At this point a crystal clear construction of the present language "petition initiating a proceeding under this Act" appears. This language, in ordinary bankruptcy cases, is the legal equivalent of the former (1938) language "the petition in bankruptcy."

When the next question is asked: "Whose petition in bankruptcy does Section 60a(1) refer to?" the answer is equally clear. It is the petition of the transferor-bankrupt. The words "a transfer . . . by such debtor . . . within four months of the filing by or against him of the petition . . . ," leave no area of uncertainty.

Any other construction would fly in the face of the statutory history and analysis by text-writers of this section. It is noteworthy that appellee cites no authority of any kind for his radical construction of this statute.

Appellee cites Section 1 (24) of the Bankruptcy Act, ostensibly in support of his theory that some petition other than that of the transferor controls Section 60a. However, the statutory definition of a "petition" lends no support to the Trustee's theory as is demonstrated by the Congressional Report on page 5 of Appellee's Brief.

Section 1 (24) of the Act merely replaced a verbose definition which did not include a petition under Chapters X, XI, XII, and XIII of the Act. This, prior to 1952, appeared in Section 1 (20) of the Act as follows:

> " 'Petition' shall mean a paper filed in a court of bankruptcy with a clerk or deputy clerk by a

> debtor praying for the benefits of this title, or by creditors, alleging the commission of an act of bankruptcy by a debtor therein named;"

It is also noteworthy that the congressional report cited by appellee (H.R. 2320 on S. 2234, 82nd Cong., 2nd Sess.) observes on page 4 that the change in Section 1 (24) was anticipated two years earlier in the 1950 Amendment of Section 60a of the Act.

The Conclusion is thus inescapable that the four months' period in Section 60a has reference to a petition in bankruptcy by or against the transferor of the alleged preference. The transferor in this case is admittedly a partnership on whose behalf two petitions for adjudication in bankruptcy were filed over ten months after the alleged transfers.

2. Partnership petition condition precedent to Trustee's action to recover for partnership preferential transfer.

This principle is applicable because of the interrelationship between Sections 5(i) and Section 60a of the Act. As is pointed out in appellants' brief, we believe the law clearly requires a partnership petition for adjudication and administration of partnership assets in bankruptcy. Although there are no cases on this point, we believe the 1938 Amendment of Section 5(i) did not destroy the entity theory of partnerships in bankruptcy.

On the contrary, the effect of the 1938 Amendment was to remove two objectionable features from partnership bankruptcy law. The first was the difficulty in involuntary proceedings of proving a partnership act

of bankruptcy even though all of the individual partners had been adjudicated bankrupt. The second was the fact that in voluntary proceedings, a partnership could not be adjudicated a bankrupt without the consent of all the general partners, irrespective of the prior adjudication of all of the general partners individually. This is pointed out in I Remington on Bankruptcy, §57, §82, §84 and §86.

There is no question that these objectionable features have been cured by the 1938 Amendment of Section 5(i). But the Section 5(i) amendment has not repealed other sections of the Act not inconsistent therewith. Sections 5(a), (b), and (c) (providing for voluntary or involuntary petitions by or against the partners individually, as a partnership, or combined), Section 18 (requiring a partnership petition), and Section 30 (Rules, Forms and Orders, Form 4 of which sets forth the partnership petition) have not been repealed by implication.

Courts do not favor repeal of long established principles of law by implication, and the legislature will be presumed not to intend such a result unless such intention is made clearly to apply by express declaration and necessary implication (50 Am Jur, Statutes, §340 at p. 332). Where it is possible to do so, it is the duty of courts to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions (50 Am Jur, Statutes, §363 at p. 367).

I Remington on Bankruptcy, §84, in discussing the

difference between a petition for adjudication of individual partners and the partnership itself states:

> "But, since there is a definite distinction between the adjudication of a partnership as a firm and the individual bankruptcies of some of its members, a petition seeking partnership adjudication must be clearly directed to that end if it is to be considered for the purpose. There is no sanction for an anomalous application bearing no identifiable indications as to whether it is directed to partnership bankruptcy or to bankruptcy of some of the individual partners."

In the instant case, there was no "anomalous application" such as Remington excoriates. There were five individual voluntary petitions, each filed on official Bankruptcy Form No. 1. Over seven months later there were two partnership petitions filed.

The first petition (Exhibit 1) was the Trustee's petition for adjudication of the partnership. As to this petition, appellee sets forth an argument on page 11 of his brief which appears both inconsistent and absurd. The Trustee claims that this petition does not qualify as a "petition initiating a proceeding under this act" (the language of §60a) because it was not an ordinary voluntary or involuntary partnership petition. Whether or not this be true, it was the first petition of any type which requested adjudication of the transferor-partnership. It would thus seem that the Trustee seeks a very narrow construction of the language of §60a in order to exclude the petition filed on March 25, 1955. At the same time the Trustee is willing to stretch the fabric of §60a to the tearing point in his

attempt to have the same language cover the individual petitions which did not seek the adjudication of the transferor-partnership.

In any case, the partnership petition filed on April 12, 1955 (a portion of Exhibit 5) qualified under any test as a normal voluntary petition seeking adjudication of the transferor-partnership. This petition was executed by all of the partners on official Bankruptcy Form No. 4, entitled "Partnership Petition." A separate filing fee was exacted for the partnership petition (Exhibit 5).

If it is possible to construe §5(i) as eliminating any requirement of a partnership petition for a partnership adjudication, the course actually followed by the appellee represents exactly the opposite construction.

However, the transferor's susceptibility to adjudication is not the legal equivalent of a petition for adjudication. Thus, even if it be true, as appellee contends, that automatic partnership adjudication is possible under §5(i) of the Act, that avails nothing unless, as a necessary corollary, §60a has been amended by implication. From the authorities previously cited, it is well recognized that amendments and repealers by implication are looked on with disfavor by courts. Particularly is this so when it is possible to construe the various sections harmoniously with each other. Assuming that a conflict exists, a harmonious construction is that, although no partnership petition is necessary under §5(i) to obtain adjudication, it is necessary if the Trustee seeks to invoke the benefits of §60a.

This is particularly true because the four months' period is a judicial prerequisite of the Trustee's cause of action. As is stated in Nadler's Law of Bankruptcy, §643 at page 573:

> "The fifth factor of a voidable preference relates to the 'four months' ' period between the making of the transfer and the filing of the bankruptcy petition. Seemingly simple and clear is the statutory provision that the transfer must have been made 'within four months from the filing.' An otherwise voidable preference cannot be invalidated where the bankruptcy petition had been filed after the expiration of this four months' period."

Illustrative of the judicial policy favoring the stability of transactions beyond the four months' period is the case of *Dworsky vs. Alanjay Bias Binding Corporation,* 182 F.2d 803 (2 Cir. 1950). Therein it is stated:

> "We do so because we think—although the Rules of Civil Procedure should be liberally construed—that to hold otherwise would amount to amending Section 3 Sub. b of the Bankruptcy Act. The statute which makes all preferences innocuous as acts of bankruptcy after four months thus recognizes the interest of the debtor in not being adjudged a bankrupt because of old transfers to creditors and that of the creditor-transferees in not having old transfers to them upset."

CONCLUSION

A transaction is not preferential unless within four months of the petition in bankruptcy of the transferor. This requirement is as jurisdictional as a statute of limitations. The record clearly shows that the challenged transfers were not within four months of the petitions in bankruptcy of the transferor-partnership, Alpine Lodge. The judgment should be reversed.

Respectfully submitted,

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